represented $6,000.00 per year loss in income not including shift differential pay.

On November 18, 1997, the Agency served a "Notice of Proposed Reduction in Grade and Pay" upon Fox. Then, on February 4, 1998, a "Letter of Decision Adverse Action Reduction in Grade and/or Pay" was served on Fox.

On February 14, 1998, Fox began working as a Custodial Laborer. Agency managers made it clear that the new assignment was not only a reduction in pay, but also would be used to diminish Fox's standing with his coworkers by humiliating him.

On February 15, 1998, Fox began an extended period of sick leave due to exacerbation of his hypertension caused by increased stress at work.

Greivance procedures were filed concerning the "Proposed Reduction" of November 19, 1997, and against the "Decision Letter" of February 11, 1998, in order to come to some resolution of this matter. The grievance procedures were dropped at Step 3 when it was decided to proceed through the MSPB appeal process.

On February 17, 1998, an Appeal of the Agency's Adverse Action was made to the Merit Systems Protection Board. On August 24, 1998, an Initial Decision ("ID") was issued by Administrative Judge Peggy Seaman, AFFIRMING the Agency's action. App. H.

Fox submitted a Petition for Review ("PfR") of the ID, and on April 26, 1999, the Merit Systems Protection Board ("MSPB") GRANTED the PfR, AFFIRMED in part, and VACATED in part, and REMANDED the appeal for further adjudication. App. G. Administrative Judge Seaman then issued another Initial Decision, dated June

11, 1999, again AFFIRMING the Agency's action. App. F. Another PfR was submitted against the subsequent ID, and on January 3, 2000, the Board issued its FINAL ORDER, indicating that the "initial decision of the administrative judge is final". App. E.

Fox timely appealed the MSPB's Decision to the Equal Employment Opportunity Commission ("EEOC"). In a Decision dated May 15, 2001, the EEOC CONCURRED with the decision of the Board, effectively exhausting Fox's administrative remedies. App. D. Subsequently, Fox filed a complaint in the U.S. District Court for the State of Montana on June 27, 2001.

On April 13, 2004, the USPS filed a motion for summary judgment. Petitioner filed a response brief opposing the motion on June 15, 2004. On July 13, 2004, the motion was GRANTED. App. B.

Petitioner filed a Notice of Appeal in the Ninth Circuit Court of Appeals on September 10, 2004, and an informal brief opposing the District Court decision on November 5, 2004. In a Memorandum dated March 23, 2005, the Ninth Circuit Court of Appeals AFFIRMED the lower court's decision. App. A.

Further, a petition for rehearing was filed on May 6, 2005. The petition was DENIED on May 28, 2005. App. C. Lastly, a motion to stay the mandate was submitted on May 24, 2005. This motion was DENIED on June 7, 2005.

Basically, the case boils down to this: Fox's hypertension went out of control due to management's abusive treatment and harassment. When Fox mentioned to management that he was going to a doctor and this

visit might result in a medical excuse allowing him time to resolve his hypertension problem, management responded immediately that any medical excuse restricting his traveling to training would result in Fox being reduced in grade. When Fox brought in his medical excuse, the only accommodation he needed was deferment of training until his condition was brought under control as such accommodation was previously granted to another ET. (The other ET's accommodation also included time off from work.) But management, without even any discussion with Petitioner of the length or type of deferment being sought, would not grant Fox any accommodation. All of a sudden Fox could not be allowed to continue to work on the equipment because he was not trained even though he had been working on some equipment like CFS and ACDCS for years without being offered training on them. Subsequently, management followed through with its threat to reduce Fox in grade. Fox's reward for 12 years of hard work as an ET for the Postal Service was to be "charged" for being ill—ironically due to the Postal Service's abusive treatment—and, therefore, "refusing" to attend training. His only "accommodation" for his illness was to be reduced in grade to a more physically demanding job.

INTRODUCTION

This case should never have had to have been filed. The USPS could have accommodated Petitioner's health problems but instead management decided to take a course of adverse action that they had long been seeking to take, namely action to "get" Fox. That something like this sometimes appears is not too surprising; animosities

often develop in the workplace. What is surprising is that the administrative and legal system has seen fit to abet the Agency's violation of Petitioner's rights. Petitioner sincerely believes that his Civil Service Reform Act ("CSRA") protections and his rights under the Rehabilitation Act of 1973 have been violated. The question of the violation of the Rehabilitation Act as propounded in this matter is of exceptional national importance in light of the Court's ruling in the *Toyota* case. *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 193 (2002). Additionally, Petitioner has not been afforded his Equal Protection rights guaranteed under the 14th Amendment of the U.S. Constitution. These rights violations combined with a summary judgment motion that did not meet the standards required for granting said motion provide convincing evidence that the Appellate Court was in error in affirming the District Court's ruling.

This issue is obviously of great importance to Petitioner, but it is also of great national importance as it affords the Court an opportunity to provide guidelines how a part of the ADA, namely subpart (C) of 42 U.S.C. § 12102 (2), is to be adjudicated.

REASONS FOR GRANTING CERTIORARI

I. **THE APPELLATE COURT SHOULD NOT HAVE AFFIRMED THE RULING FOR SUMMARY JUDGMENT AS IT WAS TECHNICALLY FLAWED AND THE LEGAL STANDARDS BY WHICH A COURT IS EMPOWERED TO GRANT SUMMARY JUDGMENT WERE NOT FOLLOWED.**

In its ruling, the Appellate Court did not even address the issue of whether the Agency's motion for summary judgment or the District Court's review of the motion met the legal standards to be followed for summary judgment. But Petitioner believes that if the summary judgment standards are not followed, the decision reached is obviously flawed.

Respondent's motion for summary judgment was grossly lacking in one critical respect and erroneous in most others. The critical omission of the supporting brief was its failure to cite the legal standards by which a court is empowered to grant summary judgment.

Summary judgment exists as a rarely applicable substitute to trial before the finder of fact, a finder who can observe the demeanor and candor of witnesses, study exhibits and evidence in the light of present and authenticating witnesses, and make judgments based on more than written briefs, or occasional oral arguments. Like a trial, summary judgment is a review of the material issues of the case on a *de novo* basis. Thus, the Court must view the evidence in the light most favorable to the non-moving party, and drawing all reasonable inferences in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250, 255 (1986). These protections assure that summary judgment be used for its sole and express purpose: That judgment without a trial be allowed only when a trial would serve no purpose whatsoever, because the uncontested facts, when combined with the guiding legal principles, can lead to only one insurmountable conclusion.

Therefore, the Court must determine whether there are **any** genuine issues of material fact and what is the

correctly applied relevant substantive law. Fed.R.Civ.P. 56(c), App. 74a. The moving party—in this case the Respondent—bears the "initial burden of identifying for the Court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). If, and only if, the moving party meets its initial burden, the burden shifts to the non-moving party to set forth *specific facts* showing that there is a genuine issue for trial. Fed.R.Civ.P.56(e), App. 75a. In this procedure, that prospectively denies on party or the other of its 7th Amendment right to a trial, the Court may not weight the evidence or determine the truth of the matter but may only determine whether there is a genuine issue for trial. *Playboy Enterprises, Inc. v. Netscape Communications Corporation*, 354 F.3d 1020 (9th Cir. 2004).

Thus, so high is the standard, the summary judgment is rarely to be granted, in deference to the non-moving party's right to trial. The case presents a particularly appropriate opportunity to look with disfavor at summary judgment because, as the Respondent points out in its brief, it is a federal employee discrimination claim of the "mixed case" variety. Thus, numerous factual and procedural protections built into federal law for the Petitioner are at bear, and compel a thorough trial review.

Petitioner contends that the District Court was in error granting the motion as neither the District Court nor the motion satisfied the standards that are to be met for summary judgment. First, the District Court did not view the evidence in the light most favorable to the non-

moving party. This is clearly shown in a statement from the Court's analysis wherein the Court states that "it appears Fox was able to perform all specific duties related to the ET except for an inability or **unwillingness** to travel for required training..." (emphasis added). App. 15a. Not even the U.S. Attorney made an assertion such as this in the context of Fox not traveling while he had health problems. Second, the Court allowed evidence from a deposition that contained objections not ruled upon by the Court to be considered.

And, finally, the motion will be shown in Section III to have failed to show that there is no genuine issue for trial.

II. THE ADMINISTRATIVE JUDGE'S ("AJ") DECISION TO UPHOLD THE AGENCY'S ACTIONS DID NOT CONFORM TO THE PETITIONER'S CIVIL SERVICE REFORM ACT PROTECTIONS AND THUS THE AJ'S RULING SHOULD NOT HAVE BEEN AFFIRMED BY THE APPELLATE COURT.

The standard of review to be used by the Court for non-discrimination claims shall be, in part, that the determinations are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law". 5 U.S.C. § 7703(c)(1), App. 66a.

Under this standard, the Appellate Court was also in error in affirming the MSPB's non-discrimination rulings for the reasons delineated in **A.**, **B.** and **C.** below.

A. The Agency did not provide any evidence that the demotion of Petitioner would promote the efficiency of the service as required by statute which alone invalidates the Agency's actions.

The MSPB's determination was not in conformance with the law. Both 5 U.S.C. § 7513(a), App. 64a and 5 C.F.R. 752.403(a), App. 73a, clearly state that an agency may not take an adverse action against an employee unless that action will promote the efficiency of the service. The Agency has never produced any evidence to show how their adverse action would improve the efficiency of the service. The AJ tried to help the Agency in this regard by stating that waiving Fox's training requirements "would not promote the efficiency of the service". App. 39a. This assertion is not logically or legally the same as asserting in the affirmative that a certain action would improve the efficiency of the Agency. Even if the Agency were to try to give some such form of evidence, Petitioner does not believe that a fair minded person would conclude that the reduction of Fox – the senior ET at the Billings Post Office with 12 years of experience, a B.S. in Physics with post graduate work, FCC general class license, four years of electronics experience in the U.S. Air Force, thousands of dollars of training by the U.S. Postal Service – and his replacement by largely untrained individuals, would contribute to the efficiency of the Agency.

B. The Agency took action prohibited by 5 U.S.C. § 2302, which again invalidates the Agency's actions.

The provisions of 5 C.F.R. § 752.403(b), App. 73a, also brand the MSPB determinations as not in conformance with the law. 5 C.F.R. § 752.403(b), App. 73a, states that the Agency may take no action that is in violation 5 U.S.C. § 2302, App. 64a. One of the provisions of 5 U.S.C. § 2302 is that there shall be no personnel action taken that discriminates against an individual by reason of his disability. 5 U.S.C. § 2302(b)(1)(d), App. 64a. As Petitioner will show below, he is a disabled person for purposes of this regulation, and thus his demotion was not lawful.

C. The MSPB's rulings were arbitrary and therefore they should not stand.

In the first instance, Petitioner was demoted rather than being provided any accommodation when he became ill, in contrast to another ET who was granted a period of deferment while he recovered from his infirmity. The AJ originally argued in her Initial Decision that the reason that there was no disparate treatment between the other ET and Fox was that the other ET's condition was temporary and Fox's was not. App. 58a. When the Board of the MSPB pointed out that there was also testimony that Fox's condition was also temporary, the AJ in a further Initial Decision then changed her argument to explain away the disparate treatment. She now concluded that there was no disparate treatment because the other ET had provided management with sufficient medical documentation and a specific time frame in which he could eventually attend training, and Fox had not. App.

36a. Petitioner has yet to locate this "documentation". But the AJ ignores the clear evidence of disparate treatment. When Fox mentioned that he might be seeking a medical deferment of training, he was told that he suddenly could no longer be allowed to work any longer without training. (Even though he had been working many years on equipment such as CFS and ACDCS without management providing Fox any training on them.) And if he eventually brought in medical certification that precluded training, he would be demoted. Thus, Fox was going to be demoted even before he obtained his certification; it had nothing to do with his deferment not being temporary. The other ET was allowed to continue working and was granted a deferment on the other hand. This is a clear case of an arbitrary adverse action.

In a similar vein, showing the arbitrariness and uniqueness of Fox's demotion, is the Agency's lack of action when ETs have failed training. The Agency contends that training is an essential function of an ET's job. In that regard, USPS Rule 711.412(c) states in part that "less than satisfactory performance in the training, may jeopardize the employee's position". ELM Rule 711.412(c), App. J. A junior ET failed his "qualifying" course and no action was taken against him. In fact, no action has been taken against any ET that has failed a course. (Apparently the essential function of training is the trip to Norman not actually learning anything!) The only ET that has ever lost his position is Fox through a thoroughly arbitrary demotion when he sought a deferment of training while he recovered from his health problems.

III. THE AGENCY DISCRIMINATED AGAINST THE PETITIONER BY NOT REASONABLY ACCOMMODATING HIM IN VIOLATION OF § 501 OF THE REHABILITATION ACT OF 1973 AND THE RULING FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AFFIRMED BY THE APPELLATE COURT.

PLEASE READ. As detailed above, a showing by Petitioner that the discrimination is viable and actionable would compel a rejection of Respondent's motion for summary judgment for both the discrimination and non-discrimination portions of the case.

The Respondent's brief presented several arguments in support of summary judgment. While these arguments might fairly be characterized as useful or predictable trial arguments, they hardly support judgment in the Respondent's favor, much less summary judgment under the heightened standards that apply to that procedure.

Mistakenly, the Respondent contended that the Petitioner does not qualify as a disabled person because he cannot prove that he is, has a record of being, or is considered to be substantially impaired in a major life activity. This contention is wrong and misleading for a number of reasons as shown below.

However, the great mistake made by the Respondent was its restrictive definition of disabled. Under the Federal Rehabilitation Act, a claimant can establish his disabled status through one of three ways. The mere fact (presuming it was true) that he could not prove that he was impaired in a major life activity does not entitle the Respondent to judgment as a matter of law. The Rehabilitation Act actually describes three ways by which

an employee may be deemed or designated "disabled". The Rehabilitation Act defers its definitions and proscription of violations to the Americans with Disabilities Act ("ADA").

> "The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C., 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment."

29 U.S.C. § 791(g). Under the ADA, disability is defined as follows:

> "(2) Disability. The term "disability " means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment."

42 U.S.C. § 12102(2).

Subpart (C) is the most compelling and the *pro se* Petitioner will limit his argument to show that at least subpart (C) confers disabled status to Fox. Subpart (C) states that an employee is impaired if the employer

regards him as so. As the facts found at the MSPB hearing showed, the Respondent acknowledged and regarded the Petitioner as disabled by removing him from his position and demoting him substantially to a six grade level lower job that would never require travel. Assuming the Agency was acting in good faith, why else would they demote an individual that was so qualified for his position in order to fill his job with someone that would take years to train if they did not believe Fox's condition was long term. This simple act cemented the Petitioner's standing as a disabled person for purposes of the Rehabilitation Act.

The District Court argued—in concert with the Respondent—that the Agency did not think that Fox's symptoms were significant impairments but that "the USPS merely concluded that Fox's symptoms prevented him from attending required training...". App. 15a. The argument is utterly disingenuous. Even the MSPB concluded that the Agency's action was clearly based on Petitioner's alleged disability. App. 50a. (So much for following the standard of viewing the evidence in the light most favorable to the non-mover.)

The District Court points out that the subpart (C) standard, like the standard for an actual disability, requires an impairment that limits a major life activity. App. 15a. Part of Fox's limitations was sitting. Both case law and federal regulations have recognized sitting as a major life activity. *Medlock v. City of St. Charles*, 89 F.Supp.2d 1079 (E.D. Mo. 2000); Appendix to C.F.R. 29 Part 1630.2(i), App. 73a. The District Court also references case law that has determined that the impairment be substantially limiting. App. 15a. The test

for what is to be considered substantial is the average person standard. *Bochenek v. Walgreen Co.*, 18 F.Supp.2d 965 (N.D. Ind. 1998); *Lynch v. Lee*, 16 AD Cas 181 (E.D. La. 2004). In the case of Fox, this test is easily met as his sitting problem prevented him from traveling to school which an average person could easily do if he did not have a problem sitting. There is additional case law that requires that the employer be aware of the limited person's impairment. *Lynch v. Lee*, 16 AD Cas 181 (E.D. La. 2004); *Szczesny v. G.E.*, 66 Fed. Appx. 388 (CA3 Pa. 2003). This condition is also easily met in this case as the Respondent's own doctor, Dr. Drill, reported Plaintiff's sitting impairment to postal management. App. 78a.

In light of the facts and the legal principle agreed here, there is no doubt that the Petitioner was a disabled person and, thus, entitled to the benefits of the Rehabilitation Act.

The most peculiar of the arguments made by the Respondent was its interpretation of the "otherwise qualified" requirement of the Rehabilitation Act. Space precludes Petitioner fully rebutting Respondent's argument. But any employee who performed the duties of his job successfully for 12 years before becoming disabled is clearly "otherwise qualified", **but for** his disability, and thus satisfies the "otherwise qualified" standard.

The question of whether an "otherwise qualified" employee can perform his employment duties following the onset of a disability is a question of accommodation. Nevertheless, the Petitioner amply demonstrated through years of service that but for this disability, he was well qualified to perform the duties of an Electronic Technician.

Contrary to the contention in the Respondent's brief, no attempt was ever made to accommodate the Petitioner's disability in any way. How much of an accommodation the Respondent could reasonably make was never considered in the context of Rehabilitation Act analysis. Rather, the Plaintiff was disciplinarily demoted from a Grade 9 ET position to a Grade 3 custodial position. Thus, the court may immediately dispense with any argument or contention that the Petitioner was accommodated to the best of the Respondent's ability, or that the demotion for disciplinary reasons was "reasonable".

Countless options existed and continue to exist to actually "accommodate" the Petitioner's condition. One such option was to allow him to be trained in Billings, although the Respondent seems to dismiss that option out-of-hand. Unfortunately, in trying to dismiss the training-at-Billings option, the U.S. Attorney has been guilty of misrepresenting the facts due to the lies she has been told by the Agency.

Respondent's contention that they could not train Fox at Billings because it would be too costly to shut down the machines is preposterous. It would have cost nothing to shut down the machines; they were shut down long enough every day for maintenance that it would have been possible to train Fox during that time. In fact, two instructors from the training center at Norman, Oklahoma, came up to Billings and provided training for one of the machines while it was shut down—a machine that the Postal Service said could not be shut down because it would be too costly!

Another option could have been to remove the Petitioner to a different position that he is qualified to perform at the same rate of pay and benefits he possessed as a Grade 9 ET.

During the course of trial, the Court will be privy to the numerous options that would be available and appropriate for the circumstances presented here. The Respondent's brief, by foregoing one such option, illustrates two points: first, the determination of what the Agency can truly do to accommodate the Petitioner and of what the appropriate accommodation is by its nature as a determination of fact, which precludes summary judgment. Second, the vast number of conceivable options to accommodate the Petitioner requires judicial consideration, not only as an element of the case, but as a measure of damages.

Therefore, what is and is not a reasonable accommodation is a matter to be judged on a case by case basis, and not washed aside summarily in summary judgment.

Unequivocally, the foregoing has shown that the Petitioner has not been afforded his rights under the Rehabilitation Act and that there are genuine issues of material fact still remaining. The fact that the MSPB Board concluded that Respondent's action was based on the Petitioner's alleged disability is strong evidence that a jury could find in favor of the Petitioner, the non-moving party. Accordingly, since there are still genuine issues for trial, by rule the motion as it relates to the discrimination part of the case should be denied. Fed.R.Civ.P. 56(c), App. 74a. Additionally, because an adverse action has been taken against Fox based on his disability, a

personnel action forbidden by statute 5 U.S.C. § 2302(b)(1)(D), App. 64a, the AJ's non-discrimination determinations were not in conformance with the law and said determinations should not be affirmed.

IV. PETITIONER'S EQUAL PROTECTION RIGHTS UNDER THE 14TH AMENDMENT OF THE U.S. CONSTITUTION HAVE BEEN VIOLATED AS HE WAS ONLY ALLOWED TO PRESENT ONE WITNESS AT THE MSPB HEARING AND NOW IS NOT BEING ALLOWED A TRIAL *DE NOVO* TO CONSIDER THE AGENCY'S DISCRIMINATION AGAINST PETITIONER.

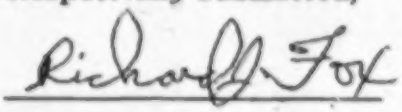
Petitioner believes that if he is not to be given the "wins-all-ties" treatment conferred upon him by the summary judgment standards, he should at last be afforded equal protection as required under the 14th Amendment of the U. S. Constitution. But even this basic right has so far been denied to Petitioner. During the MSPB hearing Petitioner was not allowed to completely present his case; specifically, he was only permitted one of his witnesses—witnesses that would have included his doctor—whereas the Agency was permitted to present all of their witnesses. (Incredibly, Petitioner's one witness was not even allowed to give all her testimony!) Now, Petitioner is to be denied an opportunity to fully argue his case before a jury to bring to light the truth of this case. The ability to bring this matter before a jury is especially important to this Petitioner as he is acting *pro se* because of his lack of financial resources. Petitioner has not taken any depositions, instead relying only on testimony given at a trial to bring to light new evidence that Petitioner

has become aware of since the MSPB hearing. This lack of depositional evidence has weakened Petitioner's ability to argue against the motion for summary judgment and further eroded Fox's 14th Amendment rights. Pet. 1. The only way now to issue those equal protection rights is to deny the motion and allow the trial to go forward.

CONCLUSION

The petition for a writ of certiorari should be granted for the purpose of entertaining this matter on appeal at which time Petitioner will request that the Court remand the case back to District Court with an order that the summary judgment be denied and that the case proceed accordingly.

Respectfully submitted,



Richard J. Fox

Acting Pro Se

August 16, 2005.

APPENDIX A

FILED
MAR 23, 2005
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD J. FOX, Plaintiff-Appellant, v. U.S. POSTAL SERVICE, John E. Potter, Postmaster General, Defendant-Appellee.	NO. 04-35825 D.C.No.CV-01-00105-RFC **MEMORANDUM***

Appeal from the United States District Court
for the District of Montana
Richard F. Cebull, District Judge, Presiding
Submitted February 2, 2005**
Before: **SKOPIL, FARRIS**, and **T. G. NELSON**, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except

Richard J. Fox was demoted when he refused to travel for training that his employer, the United States Postal Service (USPS), believed was necessary for Fox's employment as an Electronics Technician (ET) in Billings, Montana. Fox contested the demotion administratively, and when he did not prevail, he filed this pro se action in federal district court alleging discrimination based on a medical disability. The district court granted summary judgment in favor of USPS. We affirm.

DISCUSSION

We first note that Fox raised claims in district court that were not presented in the administrative proceedings. We agree with the district court that those claims are not exhausted and need not be addressed. See Leong v. Potter, 347 F.3d 1117, 1121-22 (9th Cir. 2003) (upholding dismissal of discrimination claims against USPS for failure to exhaust administrative remedies).

Fox did raise and exhaust his claim of employment discrimination under the Rehabilitation Act 29 U.S.C. § 994. The Act requires that federal agencies, including the USPS, "reasonably accommodate an employee's disability." Mcleaen v. Runyon, 222 F.3d 1150, 1153 (9th Cir. 2000). A court's "first inquiry is whether [plaintiff] is a person with a disability as defined by the Rehabilitation Act." Coons v. Secretary of Treasury, 383 F.3d 879, 884 (9th Cir. 2004). An individual may be disabled by "a physical or mental impairment that substantially limits

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as may be provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed.R.App.P. 34(a)(2).

one or more of the individual's major life activities". Id.

We agree with the district court that Fox is not disabled for purposes of Rehabilitation Act. As the Supreme Court has explained, "[m]erely having an impairment does not make one disabled. . ." Toyota Motor Mfg. v. Williams, 435 U.S. 184, 195 (2002). Rather, the claimant must demonstrate that the impairment substantially "limits a major life function." Id. The Court reasoned that the "individual must have an impairment that prevents or severely restricts. . . activities that are of central importance to most people's daily lives." Id. At 198. We have identified such activities to include "caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and working." See Fraser v. Goodale, 342 F.3d 1032, 1038 (9th Cir. 2003), cert denied, 541 U.S. 937 (2004).

Fox claims to suffer from hypertension and stress that precludes him from traveling. We agree with the district court that "Fox's symptoms do not prevent him from performing any major life activities." Moreover, even accepting Fox's argument that "sitting" is a major life activity, the record indicates that Fox's "sitting ability was not affected on an ongoing basis and... medication usually controlled his impairment." Fox has therefore failed to show that he suffers an impairment or that the USPS regarded him as suffering from such an impairment.

Fox also challenges the administrative determination upholding the USPS's adverse employment decision. First, he contends the demotion did not "promote the efficiency" of the organization. But, as the ALJ carefully explained, waiving Fox's training requirements because of Fox's "unique capabilities" or the availability of other trained ETs "would not promote the efficiency of the

service." Second, Fox argues he suffered "disparate treatment" compared with another ET who was allowed to defer training. Again, the ALJ explained that the other ET, who was granted a temporary deferment to recover from surgery, had "provided management with sufficient medical documentation and a specific time frame in which he could eventually attend training." Fox, in contrast, "never. . .provided any medical estimation. . .of time after which he would be able to travel." Third, Fox contends the USPS could have accommodated him but refused. The record supports the ALJ's conclusion, however, that it would be "prohibitively costly to shutdown extremely complex, on-site machinery in Billings, Montana in order to train one employee." Finally, Fox argues he was not demoted to the "highest grade for which he was qualified." The ALJ noted, however, that all ET positions require travel for training so that "a demotion to one of those lower-graded positions would not solve the problem." "[B]ased on the testimony of the agency's witnesses," the ALJ determined that USPS "demoted [Fox] to the highest available position that did not require travel." We have carefully reviewed the record and we conclude that these determinations are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See Coons, 383 F.3d at 888.

AFFIRMED.

APPENDIX B

FILED, ENTERED, AND
NOTED IN CIVIL DOCKET
July 13, 2004
Patrick E. Duffy, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

RICHARD J. FOX,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CV 01-105-BLG-RFC
	)	
JOHN E. POTTER, Postmaster General, United States Postal Service Agency, General,	)	
	)	
	)	**JUDGMENT IN A**
Defendant.	)	**CIVIL CASE**

____ Jury Verdict

____ Decision by Court Order (copy attached.)

IT IS ORDERED AND ADJUDGED:

Defendant's motion for summary judgment is granted and the decision of the MSPB is affirmed.

JUDGMENT IS ENTERED in favor of defendant John E. Potter, Postmaster General, United States Postal Service Agency, and against Plaintiff Richard J. Fox.

Patrick E. DuffPatrick E. Duffy July 13, 2004

Clerk of Court

S/ _____

(By) Deputy Clerk

In Billings, Vol. #84

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

RICHARD J. FOX,	) CV-01-105-BLG-RFC
Plaintiff,	)
vs.	) ORDER
JOHN E. POTTER, Postmaster General, United States Postal Service Agency, General,	)
Defendant.	)

FACTS

Plaintiff Fox was hired as a part-time distribution clerk with the Postal Service in Billings, Montana ("USPS") in November of 1981. In 1985, Fox was promoted to a maintenance position. In 1986, after completing various training, Fox was promoted to an electronics technician ("ET") position.[1] After being pro-

[1] An ET conducts the repairs and troubleshoots the extra-difficult problems which ordinary maintenance technicians are not trained to handle.

moted to the ET position, Fox continued to attend mandatory training, doing so in 1987, 1988, 1992, and 1993.

In 1996, the USPS underwent a major change in mail sorting equipment, changing to an automated system. As a result of the change, in June and July of 1996, USPS directed all Ets not previously qualified to attend training at the USPS's Oklahoma training facility. Plaintiff Fox was one of only two individuals who failed to attend the training prior to start up of the new system in November of 1996.[2] The USPS commenced efforts to get Fox to training in Oklahoma. In June of 1996, Fox stated he could not attend training in June or July. In July of 1996, Fox indicated he could not go to a training in August or September due to the fact that he was working on getting his TV station going.[3] When slots opened up for training in October and November of 1996, Fox again responded that his TV work prevented him from attending training.

On December 17, 1996, Fox's supervisor presented Fox with a form to confirm Fox would attend training in January of 1997. Fox refused, stating in his deposition that he "didn't feel [he] needed to go." On December 19, Fox was given a letter ordering him to attend the required training and stating what the consequences would be for failure to obey, specifically noting that failure to attend would jeopardize his ET position. After receiving the letter, Fox filed a grievance claiming that he was being harassed and requesting that not be required

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[2] The other individual was recovering from a hernia operation and went to the training after he recovered.

[3] Fox had been trying to get a TV station started since 1982. Fox was able to get the TV station on the air in 2001 but receives no income from this enterprise.

to attend the training. Ultimately, Fox attended the training in January of 1997.

On February 14, 1997, all USPS offices with remote barcoding systems (of which the Billings office was one) received notice of a new mandatory training for the barcoding system to be conducted in June and July of 1997 at the USPS Oklahom training facility. On May 15, 1997, Fox's supervisor left a note for Fox on Fox's timecard for him to sign the travel form to attend the barcoding system training. The unsigned form was returned to the supervisor's office. On May 16, 1997, another note was left on Fox's timecard and again returned unsigned. On May 19, 1997, Fox's supervisor took the form to Fox, and Fox refused again to sign the form. Fox did not attend the training.

In August of 1997, a notice was sent to all ETs advising of two training sessions, one in September and one in October, and directing that they select the one they preferred or otherwise one would be assigned to them. After learning that Fox had signed up for neither session, his supervisor prepared a form for Fox to attend the September training. When presented with the form, Fox refused to sign, claiming that he could not attend the training because he was moving, his car was broken, and "his nerves were shot."

On September 26, 1997, a meeting was held with Fox, Fox's supervisor, a USPS human resources manager, and the director for Fox's union. Following the meeting, the USPS human resources manager sent Fox a letter verifying that if Fox brought a medical certificate from his treating physician before October 7, 1997, indicating that he could not go to training in Oklahoma, he would be removed from his ET position and placed in another

position in maintenance. By October 17, 1997, Fox had failed to bring the medical certificate, so his supervisor prepared a form for Fox to attend the October training course.

On October 10, 1997, Fox provided a medical verification provided by Dr. Douglas Carr, stating:

> Mr. Fox is under my care for hypertension and Peripheral neuropathy. He has indicated to me the desire of his employer to send him out of state for a training seminar of an extended length. This letter is to verify that I have advised him from a medical point of view, to decline this training session at this time, as I believe the added stress of this workshop would not be desirable from a basis of his medical treatment.

The USPS subsequently asserted that the technical training in Oklahoma was essential to the performance of Fox's job and that it was not feasible to bring trainers from Oklahoma to Billings and shut down machines so that Fox could be trained in Billings. Based on the fact that there was no reasonable way to accommodate Fox's inability to attend training, Fox was advised that action was be taken to downgrade him to a custodian position as that position had an opening available and did not require training in Oklahoma. On November 17, 1997, a Notice of Proposed Downgrade was issued to Fox for "inability to attend required training in Norman, Oklahoma Technical Training Center, due to medical condition."

Since being downgraded in 1997, Fox has not signed up to be re-promoted to an ET position nor asked his doctor if he can travel to training because, according to

Fox, he is "pursuing this case." Fox is able to see, hear and walk. He can operate a car and has driven long distances before and since his demotion. Fox's medical condition does not negatively impact his ability to work, learn or understand. In fact, the only stated impact Fox's medical condition has had on his life is his inability to attend training in Oklahoma. Dr. Carr, Fox's treating physician, has testified that Fox has controlled his hypertension with medication.

Following the demotion, Fox appealed the USPS's decision to the Merit System Protection Board (MSPB). On January 3, 2000, the MSPB affirmed the USPS' demotion of Fox. On February 26, 2000, Fox appealed the MSPB's decision to the Equal Employment Opportunity Commission (EEOC). On May 21, 2001, the EEOC upheld the decision of the MSPB, finding that Fox did not qualify for Rehabilitation Act protection because he was not a "qualified individual with disability" within the meaning of the Act.

On June 27, 2001, with his administrative remedies exhausted, Fox filed a complaint in this Court asserting claims under the ADA and a claim for breach of contract (which is in essence a claim under the Civil Service Reform Act). On April 13, 2004, the USPS filed a motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Summers v. Teichert & Son, Inc., 127 F.3d 1150 (9th Cir. 1997) (*citing* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)). Even if the evidence is merely colorable or is not significantly probative, a grant of

summary judgment is still appropriate. Eisenberg v. Insurance Co. of North America, 815 F.2d 1285, 1288 (9th Cir. 1987). The party moving for summary judgment bears the initial burden of proof to identify the absence of a genuine issue of material fact.

Once the moving party has satisfied this burden, the opposing party must set forth specific facts showing there remains a genuine issue for trial, in order to defeat the motion. Fed.R.Civ.P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir. 1986) (*cert.-denied* 479 U.S. 949 (1986)). Mere existence of a scintilla of evidence in support of the plaintiff's position is insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Anderson, 477 U.S. at 252.

Unique to this case is the fact that Fox's complaint is considered a mixed case, containing claims related to discrimination under the Rehabilitation Act along with claims arising out of adverse action determined by the MSPB. In such a case, the district court reviews the discrimination component under a *de novo* standard of review and the non-discrimination component under an "arbitrary and capricious" standard. *Romain v. Shear*, 799 F.2d 1416, 1421 (9th Cir. 1986).

ANALYSIS

Plaintiff's claim is grounded in the allegation that he has been discriminated against by the USPS because of his high blood pressure and/or stress condition.

Actions alleging disability discrimination against the USPS must be brought under the Rehabilitation Act. The Rehabiliation Act incorporates certain key provision of the ADA as the legal standards for assessing the

establishment of a claim under the Rehabilitation Act. *See* 19 U.S.C. 791(g). For this reason, Federal courts rely upon ADA case law in interpreting and applying the Rehabilitation Act. *See, e.g., McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 460 (6th Cir. 1997) ("[b]y statute, the [ADA] standards apply in Rehabilitation Act cases alleging employment discrimination.") Thus, this Court will analyze Fox's Rehabilitation Act within the context of ADA legal standards.

The ADA (and by reference the Rehabilitation Act) requires an employer to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodate would impose an undue hardship." *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 193 (2002) *citing* 42 U.S.C. § 12112(b)(5)(A). Under the ADA, a "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 USC§ 12102(2). To qualify as disabled under subsection (A) of the ADA's definition of disability, a claimant must initially prove that he or she has a physical or mental impairment. *See* 42 U.S.C. § 12102(2)(A). Furthermore, a claimant must demonstrate that the impairment limits a "major life activity," and that the limitation is "substantial." *Toyota Motor Mfg.*, 534 U.S. at 195 *citing* 42 U.S.C. § 42 U.S.C. § 12102(2)(A).

Not every impairment that affects an individual's major life activities is a substantially limited impairment. *Knapp v. Northwestern University*, 101 F.3d 473, 481 (7th

Cir. 1996). In order to meet the ADA's "substantially limits" requirement, an impairment must interfere with a major life activity "considerably" or "to a large degree." *Toyota Motor Mfg.*, 534 U.S. at 195. As the *Toyotoa Mfg.* Court noted:

> When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.

534 U.S. at 200-01.

Whether or not a claim is able to perform tasks such as "household chores," "bathing," and "brushing one's teeth," are central to this inquiry. *Id.* At 201. Similarly, being able to perform "the manual tasks required by [other] jobs" is central to determining whether an impairment is substantial. *Id.* at 201.

In this case, Fox's stated disabilities are hypertension and stress. Other Federal courts analyzing these symptoms have concluded that neither one of these symptoms constitutes a "disability" under the ADA. *See Dughand v. Wal-Mart Stores, Inc.*, 926 F.Supp.1002 (D. Kan. 1996) (employee's hyptertension not disability under ADA); *Mercer v. Brunt*, 299 F.Supp. 525 (N.D. Ill. 1997) (ADA) does not protect people from general stresses of the workplace); *Matheson v. Virgin Islands Community Bank Corp.*, 297 F.Supp.2d 819 (D. Virgin Islands 2003) (generalized stress, without more, is not a "disability" under the ADA).

Fox's symptoms do not prevent him from performing any major life activities including walking, driving, bathing, and household chores. Fox is still employed with

the USPS and is able to perform his specific job duties. Furthermore, it appears Fox was able to perform all specified duties related to the ET position except for an inability or unwillingness to travel for required training to the USPS's Oklahoma training facility. In short, Fox raises no issue of fact regarding *any* major life activity which he is unable to perform. Therefore, the Court concludes that Fox's symptoms do not rise to the level of "disabilities" under the ADA.

Fox also contends that he meets the ADA's definition of "disability" because either the USPS regarded him as being impaired or because a record exists showing he is impaired. *See* 42 U.S.C. § 12102(2)(B) and (C). The facts of this case fail to establish either one of these alternatives. This is because both of these standards, like the standard of an actual disability, require an impairment that limits a major life activity. *See E.E.O.C. v. R. J. Gallagher Co.*, 181 F.3d 645, 655 (5th Cir. 1999) (record of impairment must show a disability that limits a major life activity) and *E.E.O.C. v. United Parcel Service, Inc.*, 306 F.3d 794, 804-04 (9th Cir. 2002) (as with real impairments, a perceived impairment must be substantially limiting and significant to qualify for protection under the ADA).

As noted above, Fox's impairments are not significant to the degree required for ADA protection. There is no record evidencing anything to the contrary. Similarly, Fox has put forth no evidence indicating the USPS thought his symptoms of hypertension and stress were significant impairments. Rather, the USPS merely concluded that Fox's symptoms prevented him from attending required training, and demoted him as a result. Thus, Fox has failed to raise any genuine issue regarding the existence of a disability protected by the ADA.

In addition to Fox's disability claim, Fox also seeks relief under the Rehabilitation Act on the grounds that he was discriminated against based upon his age and/or race. As the USPS notes, however, Fox failed to raise these issues before either the MSPB or the EEOC. It is well established that claims not presented in the administrative complaint cannot be presented for the first time at the district court level. *See Bryant v. Bell Atlantic Maryland, Inc.*, 288 F.3d 124, 132 (4th Cir. 2002), ("the EEOC charge defines the scope of the plaintiff's right to institute a civil suit"). Fox's assertion to the contrary, this Court cannot simply allow him to add race and age discrimination claims at this time under Rule 15, F.R.Civ.P. Rather, Fox had a duty to exhaust such claims through the administrative process. Accordingly, the Court finds that Fox's race and age discrimination claims must necessarily be disregarded as they were not properly presented in Fox's administrative complaint.[4]

Based upon the above analysis, the Court concludes that Plaintiff Fox does not have a viable discrimination claim. Furthermore, after reviewing the administrative record in this matter, the Court concludes that the MSPB's denial of Fox's claim was proper. Accordingly, Defendant's motion for summary judgment (*Docket No. 49*) is **GRANTED**. The decision of the MSPB is **AFFIRMED.**

The Clerk of Court is directed to notify the parties of the making of this Order and to enter judgment accordingly.

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[4] Although not determinative of the issue, the Court notes that Plaintiff Fox was represented by counsel when his administrative complaint was made.

Dated this 13th day of July, 2004.

S/

RICHARD F. CEBULL

UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
MAY 18, 2005
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD J. FOX, Plaintiff-Appellant, vs. US POSTAL SERVICE, John E. Potter, Postmaster General, Defendant.	No. 04-35825 D.C. No. CV-01-00105-RFC District of Montana, Billings **ORDER**

Before: **SKOPIL, FARRIS,** and **T. G. NELSON,** Circuit Judges.

The panel has voted and unanimously to deny the petition for rehearing. Accordingly, the petition for rehearing is DENIED.

APPENDIX D

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Washington, D. C. 20507

Richard J. Fox,
Petitioner,

v.

William J. Henderson,
Postmaster General,
United States Postal Service,
Agency.

Petition No. 03A00062

MSPB No. DEO752980211B1

DECISION

On January 27, 2000, Richard J. Fox (petitioner) timely field a petition with the Equal Employment Opportunity Commission (Commission) for a review of a Final Order of the Merit Systems Protection Board (MSPB) concerning an allegation of discrimination in violation of Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 *et seq.* The petition is governed by the provisions of the Civil Service Reform Act of 1978 and EEOC regulations, 29 C.F.R. § 1614.303 *et seq.* The MSPB found that the United States Postal Service (agency) did not engage in discrimination as alleged by petitioner.

ISSUE PRESENTED

The issue presented is whether the MSPB's determination that petition failed to prove that the agency discriminated against him based on disability (hypertension) when he was demoted from a PS-9 Electronics Technician (ET) position to a PS-3 Labor Custodian position constitutes a correct interpretation of the applicable laws, rules, regulations, and policy directives, and is supported by the record as a whole.

BACKGROUND

Petitioner was employed as a PS-9 ET. On February 4, 1998, he was demoted to a PS-3 Labor Custodian because he was unable to attend required training at the Norman, Oklahoma Technical Training Center due to his medical condition.

Petitioner filed an appeal with the MSPB challenging his demotion. A hearing was held. The MSPB administrative judge (AJ) issued an Initial Decision (ID #1) sustaining the demotion and finding that the agency did not discriminate against petitioner. Petitioner filed a petition for review by the full MSPB Board. The MPSB affirmed the AJ's finding that the agency proved its charge, but vacated the rest of ID #1 and remanded it further for further adjudication. This remand was based on several factors, including the fact that the AJ made no findings with respect to whether petitioner was a qualified disabled person. On June 11, 1999, the AJ issued a second Initial Decision (ID #2), addressing the MSPB's concerns and again concluding that petitioner failed to establish the affirmative defense of disability discrimination. Petitioner again filed a petition for review by the MSPB, which was denied by Order dated January 3, 2000. The instant petition followed.

In his petition for EEOC review, petitioner argues, among other things, that various reasonable accommodations would have allowed him to perform the essential functions of his position. The agency notes that commission regulations required that a statement of the reasons why the MSPB's decision is alleged to be incorrect be included in the petition for review and that the petitioner serve copies of the petition by certified mail. Because this was not done in a timely manner, the agency contends that petitioner's request for EEOC review was untimely and requests that it be dismissed. Barring such a dismissal, the agency requests that the Commission concur with the MSPB's finding of no discrimination.

ANALYSIS AND FINDINGS

The Commission accepts petitioner's petition for consideration. Although petitioner did not comply with all the procedural requisites of 29 C.F.R. §§ 1614.303 and 1614.304, he timely filed his petition with this Commission. *See Manago v. Department of the Interior*, EEOC Petition No. 03940067 (May 26, 1994) (petitioner failed to serve copies of petition by certified mail and failed to include a statement of the reasons the MSPB's decision was incorrect, but Commission accepted petition for consideration because it was timely filed with the Commission). We now turn to the merits of petitioner's claim.

As a threshold matter, petitioner must established that he is a "qualified individual with disability" within the meaning of the Rehabilitation Act. An "individual with disability" is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include, but are not

limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). A "qualified" individual with a disability is one who satisfies the requirements for the employment position he holds or desires and can perform the essential functions of that position with or without reasonable accommodation. 29 C.F.R. § 1630.2(m).[1] The Supreme Court has held that the determination of whether a person is an "individual with a disability" must be based on his or her condition at the time of the alleged discrimination. The positive and negative effects of mitigating measures used by the individual, such as medication or an assistive devise, must be considered when deciding if he or she has an impairment that substantially limits a major life activity. *Sutton v. United Airlines, Inc.*, 527 U.S. 516 (1999).

After careful review of the record as a whole, the Commission finds that petitioner failed to show that he is an individual with a disability within the meaning of the regulations. Complainant did not established that his hypertension substantially limited a major life activity. The record contains some evidence that at times complainant's ability to sit was affected by his hypertension. *See* Appendix to 29 C.F.R. Part 1630 – Interpretive Guidance on Title I of the Americans with Disabilities Act (Appendix), § 1630.2(i) ("...other major life activities include...sitting."). While the medical documents provided by petitioner's own doctor do not mention this limitation, the medical documents produced

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[1] The Rehabilitation Act was amended in 1992 to apply the standards in the Americans with Disabilities Act (ADA) to complaints of discrimination by federal employees or applicants for employment.

during Petitioner's October 17, 1997 Fitness for Duty exam establish that petition indicated that if he sits for long periods of time, he develops "some soreness in his neck, some pressure in his head, and some numbness and tingling in both his feet and hands." Petitioner alleged that because of this, he was unable to drive or sit in an airplane, bus, or vehicle for any length of time and therefore could not attend the required training. The record contains no evidence indicating that complainant's impairment affected any other major life activity.

In order to be found "substantially limited," petitioner must establish that he is either unable to perform a major life activity that the average person in the general population can perform, or that he is significantly restricted as to the condition, manner or duration under which he can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that activity. *See* 29 C.F.R. § 1630.2(j)(1). Moreover, as noted above, in determining whether an individual is substantially limited, any mitigating measures used by the individual must be considered. *See Sutton, supra; Murphy, supra.*

Here, the record establishes that medication usually controlled petitioner's hypertension. Petitioner also argued that with a change in medication and a reduction in stress his hypertension would not prevent him from traveling to the required training, *i.e.*, he would be able to sit for a prolonged period. It is clear, therefore, that petitioner's sitting ability was not affected on an ongoing basis and that medication usually controlled his impairment. In fact, the record establishes that petitioner had traveled to similar training in the past and petitioner indicated that if he were given a temporary

dispensation, he would be able to travel to the required training in the future. Thus, even a generous interpretation of complainant's evidence establishes only that on sporadic occasions, petitioner's impairment affected his ability to sit for prolonged periods, but that this limitation was usually controlled with medication and diet. This intermittent sitting limitation is not a substantial one as compared to the average person's sitting ability.

Because petitioner was not substantially limited with respect to any other major life activity, the Commission considers his ability to perform the major life activity of working. *See* Appendix, 29 C.F.R. § 1630.2(j). An individual is substantially limited in working if the evidence shows that the impairment significantly restricts the individual's ability to perform either a class of jobs or a broad range of jobs as compared to the average person with comparable training, skills and abilities. *See Id.*; *Muskopf v. United States Postal Service*, EEOC Appeal No. 01975667 (February 25, 2000). Petitioner provided no evidence that his impairment restricted him in this manner.

Accordingly, petitioner failed to establish that his impairment substantially limited a major life activity. Moreover, there is no evidence that petitioner has a record of such an impairment or that he was regarded as having such an impairment. We find, therefore, that the evidence is insufficient to establish that petition is an individual with a disability as defined by the regulations.

CONCLUSION

Based upon a thorough review of the record, and for the foregoing reasons, it is the decision of the Commission to

CONCUR with the MPSB's decision that petitioner was not discriminated against on the basis of disability.

PETITIONER'S RIGHT TO FILE A CIVIL ACTION
(W0900)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, **within thirty (30) calendar days** of the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

S/

Frances M. Hart

S/

Executive Officer

S/

Executive Secretariat

5-15-01

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to complainant, complainant's representative (if applicable), and the agency on:

May 23, 2001

S/

Equal Opportunity Assistant

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD J. FOX, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER DE-0752-98-0211-B-1 DATE: January 3, 2000

Scott D. Morrow, Reno, Nevada, for the appellant.
Pat D. Simmons, Billings, Montana, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitioners such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.225(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of the Federal Operations
P.O. Box 19848
Washington, D.C. 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a

civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you

must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pina v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: S/

Robert E. Taylor
Clerk for the Board

Washington, D.C.

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

RICHARD J. FOX, Appellant,	)	DOCKET NUMBER DE-0752-98-0211-B-1
v.	)	
UNITED STATES POSTAL SERVICE, Agency.	)	DATE: June 11, 1999

Scott D. Morrow, Reno, Nevada, for the appellant.

Wayne A. Momsen, Billings, Montana, for the agency.

BEFORE

Peggy J. Seaman

Administrative Judge

INITIAL DECISION

In an Opinion and Order dated April 26, 1999, the Board remanded the instant demotion appeal for further adjudication. *Fox v. U.S. Postal Service,* MSPB Docket No. DE-0752-98-0211-I-1 (Apr. 26, 1999). The appeal is within the Board's jurisdiction pursuant to 5 U.S.C. §75511-13, 7701-02. For the reasons set forth below, the agency's action is AFFIRMED.

BACKGROUND

The agency reduced the appellant in grade and pay from a PS-9 Electronics Technician (ET) ($41,338.00) at

the Billings, Montana Post Office, to a PS-3 Custodian ($35,344.00) at the same location, based on a charge that he was unable to attend required training at the Norman, Oklahoma Training Center (TTC) due to his medical condition (hypertension), which prevented him from sitting for prolonged periods of time in a car, plane or classroom. Appeal File (AF), Tab 8, Subtabs 4P, 4U. The duties and responsibilities of a PS-9 ET include participating in classroom, on-the-job, and correspondence training programs, and attending courses at postal facilities, trade schools, and manufacturers' sites. AF, Tab 9, Subtab 4PPP.

On appeal, the appellant alleged that the agency discriminated against him based on a disability, and that the penalty was not reasonable. AF, Tab 23. After a hearing, I issued an initial decision sustaining the charge, and finding that the appellant had not proven discrimination and that the penalty was reasonable. In its remand Order, the Board affirmed my sustaining of the charge, but required amplification of the two latter issues.

ANALYSIS

Disability Discrimination

An appellant who raises a claim of disability discrimination may establish that he is disabled by showing that he has a physical or mental impairment that substantially limits a major life activity, that he has a record of such an impairment, or that he is regarded as having such impairment. *See* 29 C.F.R. 1614.203(a)(1)(i). The term "major life activity" means "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29

C.F.R. §1614.203(a)(3).[1] The term "substantially limits" describes a person who is unable to perform a major life activity that the average person in the general population can perform, or is significantly restricted as to the condition, manner, or duration under which he can perform a particular major life activity as compared with the condition, manner, or duration under which the average person in the general population can perform the same major life activity. 29 C.F.R. §1614.2(j)(1); *Walsh v. U.S. Postal Service,* 74 M.S.P.R. 627, 633 (1997) (the Rehabilitation Act was amended to incorporate the standards applied under Title I of the Americans with Disabilities Act).

To meet his burden of proof with respect to establishing a prima facie case of disability discrimination where the appellant cannot perform his job without some form of reasonable accommodation, the appellant must show that he is a disabled person, that the action appealed was based on his disability, and, to the extent possible, he must articulate a reasonable accommodation under which he believes he could perform the essential functions of his position or of a vacant position to which he could be reassigned. *Clark v. U.S. Postal Service,* 74 M.S.P.R. 552, 560 (1997). Where the agency explicitly bases its action on an appellant's disability, the issue becomes whether the appellant is a qualified disabled person against whom the agency may not discriminate, and whether the agency shows that the reasonable

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[1] This list in not exhaustive. For example, other major life activities include, but are not limited to sitting, standing, lifting and reaching. Appendix to 29 C.F.R. §1630.2(i).

accommodation at issue would create an undue hardship. *Brocks v. U.S. Postal Service,* 78 M.S.P.R. 101, 106 (1997). Ultimately, the appellant must prove that he is a "qualified" disabled person, e.g., a disabled individual who can perform the essential functions[2] of his position, with or without reasonable accommodation, without reasonable accommodation, without endangering the health and safety of himself or others. *Id.*

If the appellant establishes a prima facie case, the agency must produce evidence to rebut the appellant's claim. If the employer claims that the disabled individual is unqualified to perform the job, even with the proposed accommodation, the disabled individual must prove that he would, in fact, be qualified to perform the essential functions of the job if the employer were to adopt the proposed accommodation, and that the proposed accommodation is objectively reasonable. *Id.* at 107. The burden of proof remains with the appellant in such a case. *Id.* If the appellant does prove that he can perform his job, or a position to which he can be reassigned, with reasonable accommodation, and/or the agency concedes this point, the burden of production shifts to the agency to show that the reasonable accommodation at issue would create an undue hardship. Id. In determining whether a proposed accommodation would create an undue hardship for the agency, the Board will consider: (1) the overall

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[2] The term "essential functions" generally means the fundamental job duties of the employment position the individual with a disability holds or desires. 29 C.F.R. §1630.2(n)(1). The regulations set forth reasons why a job function may be considered essential, as well as evidence of whether a particular function is essential. 29 C.F.R. §1630.2(n)(2)-(3).

size of the agency's program with respect to the number of employees, number and type of facilities, and size of budget; (2) the type of the agency's operation, including the nature and composition of the agency's work force; and (3) the nature and cost of the accommodation. Id.

Here, the Board held that I should determine whether the appellant is "disabled," and whether his disability "substantially limited" a major life activity. *Fox*, slip op. at 6. I find that the appellant is disabled, because, as is further discussed below, he suffers from a condition that prevents him from attending requisite training at the TTC. Further, for this reason, I find that his disability substantially limits a major life activity, i.e., working.

The Board also requires a discussion of the appellant's argument that the agency should have accommodated him be deferring his training requirement and/or offering him a position at a higher grade level than PS-3. Id. With regard to the first argument, the appellant cites to the example of another employee, Al Doney, who did receive a medical deferment with regard to his TTC training. I found that the appellant's situation differed from Doney's, and the Board now requires further discussion of that matter. ID., slip op. at 9-10.

The appellant maintains that he has a degree in physics, and that the agency's machinery is not so complex, for him, as to warrant his need to travel to Norman, Oklahoma for training. The Board noted, though, without comment, the reasons set forth in the Initial Decision underlying the need to have the appellant travel to Oklahoma for the training. Id., slip op. at 5. But, the Board requires a finding as to whether training is an "essential function" of his position, and clarification of the reasons for my finding that the appellant is not a

"qualified" disabled person. Id., slip op. at 7. Finally, the Board has ordered further discussion of the issues of nexus and the reasonableness of the penalty. Id., slip op. at 7-10.

Here, this appellant, unlike Doney, was unable to comply with the agency's request for medical documentation showing that he would be able to travel to the TTC at some future point. The appellant testified that the agency asked him for a doctor's report stating that he could travel in approximately six months' time, but that his doctors were unable to provide such a report. As the Board noted, Id., slip op. at 10, a Dr. Carr indicated to the agency that he had advised the appellant not to travel "at this time," and stated that he would continue to follow him on at least a quarterly basis "to re-evaluate in the future." AF, Tab 9, Subtab 4E (October 8, 1997 letter).

It is undisputed that, for medical reasons, the appellant had not returned to work at all by the date of the hearing. The Board noted that there is "some evidence in the record suggesting" that the appellant's reasons for not being able to return to work were situational adjustment disorder, significant anxiety disorder, and depression, rather than his hypertension. AF, Tab 22, Exs. B, C; AF, Tab 16, Subtab 4. The appellant testified that his doctors were still providing the agency with re-evaluations, as mentioned above, at the time of the hearing; and, that they were still recommending that he not be required to travel to Oklahoma, because of his hypertension. Hearing Tapes (HT), Tape 5. He added that the stress and humiliation of receiving his demotion notice, being demoted, and later, of having his pay cut off, exacerbated his hypertension. Thus, while I find it likely that, indeed, the appellant does suffer some degree of psychological disturbance as a

result of his situation, the fact remains that he was still, at the time of the hearing, medically unable to report to training at the TTC, or to report to work at all.

There is no evidence of any temporary deferment that would have enabled him to travel, unlike in Doney's situation. The testimony was that Doney provided management with sufficient medical documentation and a specific time frame in which he could eventually attend training. HT. Doney has, in fact, traveled to the TTC for training following his temporary deferment. The appellant, by contrast, never has provided any medical estimation of a period of time after which he would be able to travel; hence, the agency, to this date, remains unable to fashion a workable temporary deferment in his case.

Additionally, as the Boards notes, *Fox*, slip op. at 5-6, the agency has explained that the PS-9 ET position encompasses the duties of the lower-graded ET positions, so that the incumbent of one of those positions is required to travel for training as well. Thus, a demotion to one of those lower-graded positions would not solve the problem. I find, based on the testimony of the agency's witnesses, HT, that the agency demoted the appellant to the highest available position that did not require travel to the TTC.

The agency explained that it is essential that the ET's be conversant with the latest machinery and technology, and that, while it is true that at any given point, some ET's have not yet received the latest training, they do ultimately get scheduled and take the training courses they need to be certified in their craft. The agency explained, HT, that "time is money" and "second count," so that having the machinery down for even a few minutes can be extremely costly; hence the need for quick, expert service from knowledgeable and certified ET's.

The importance of job training is stressed in a Postal Bulletin, which warns that "[r]efusal to attend the training, or less than satisfactory performance in the training, may jeopardize the employee's present position...." AF, Tab 8, Subtab 4SSS. Among the examples of requisite job training is "A PEDC or Technical Training Center digital electronics course for an electronics technician." Id. As the Board noted, Fox, slip op. at 2, the PS-9 ET Position Description requires the training. AF, Tab 9, Subtab 4PPP. In light of the necessity for having the agency's ET's continuously trained in the latest technology at the TTC, for financial and for efficiency-based reasons, I find that the training is an "essential function" of the ET position.

In short, I find that neither of the appellant's requested accommodations, i.e., temporary deferment or demotion to a lower-graded ET position, is feasible, for the reasons set forth above. Thus, I find that the appellant has not met his burden of showing that he is a "qualified: disabled person entitled to accommodation. Alternatively, assuming arguendo that he had met that burden, I find that the agency has demonstrated that the requested accommodations are not reasonable. I conclude that the appellant has not demonstrated his affirmative defense of disability discrimination. *See Brock*, 78 M.S.P.R. at 106.

Nexus

The Board found the nexus issue insufficiently developed because, as noted above, there will always be some ET's, at any given time, who have not yet attended the latest training course. Impliedly, then, it is not clear why the facility cannot function with some employees not receiving training. All employees do receive the training, however, within a time that is relatively certain, unlike

the appellant. There will always be improvements to existing machines, and the introduction of new machines, and a need for ET's to be trained in their latest use. The agency's witnesses explained, at the hearing, its rotating system for sending ET's to training; ultimately, in turn, they all go to the TTC. The alternative would be to send all ET's to training at the same time and, thus, shut down the whole facility during their absence, at an exorbitant cost. Such action would obviously not promote the efficiency of the service. Nexus is clear where an employee is unable to perform an essential function of his position. As the agency explained, in the face of the appellant's inability to go to training, it had to clear his position so that it could be filled by another employee, who could do so. *See, e.g., Fontes v. Department of Transportation*, 51 M.S.P.R. 655, 665 n.7 (1991) nexus exists where the grounds for the action relate to either the employee's ability to accomplish his duties satisfactorily or to some other legitimate government interest).

While the appellant was an able employee, the agency persuasively argued at the hearing that, even if he did posses unique capabilities, he would be all the more efficient with proper training. In short, I conclude that it would not promote the efficiency of the service to simply waive the ETs' ongoing training requirements in the case of the appellant; the comparison employees consist of other ET's who do attend training, albeit they may not, at all times, have yet completed the latest course.

The penalty is reasonable.

I have found that the appellant, because of his inability to travel to training in Oklahoma because of his hypertension, was not entitled to placement into any of the lower-graded ET positions, which all require such ongoing travel for TTC training. I have also found that he

was demoted to the highest graded position that did not require such travel. Further, I have found that he was not treated disparately as compared with Doney. Finally, there was no end in sight to the appellant's inability to travel. The deciding official testified that he considered these factors. HT. Thus, for all of these reasons, I find that the penalty of demotion is reasonable. *See, e.g., Cole v. Department of the Army,* M.S.P.R. 288, 292 (1998) (where the agency's single charge has been sustained, the Board will accord proper deference to the agency's penalty selection, reviewing the penalty only to determine if the agency considered all relevant factors and exercised management discretion within tolerable limits of reasonableness).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: S/

Peggy J. Seaman

Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on July 16, 1999, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more

than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by reference to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board

Merit Systems Protection Board

1120 Vermont Avenue, NW., Room 806

Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations

Equal Employment Opportunity Commission

P. O. Box 19848

Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. §2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment At, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. See 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX G

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD J. FOX, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	)	DOCKET NUMBER DE-0752-98-0211-I-1 DATE: April 26, 1999

Rosemary Boschert, Esquire, and Toby Alback, Boschert Law Firm, Billings, Montana, for the appellant.

Wayne A. Momsen, Whitehall, Montana, for the agency.

BEFORE

Ben L. Erdreich, Chairman

Beth S. Slavet, Vice Chair

Susanne T. Marshall, Member

OPINION AND ORDER

The appellant has filed a timely petition for review of an initial decision that affirmed the agency's demotion action. For the following reasons, we GRANT the petition for review,

AFFIRM the administrative judge's finding that the agency proved its charge, VACATE the rest of the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

The agency reduced the appellant in grade and pay from a PS-9 Electronics Technician (ET) ($41,338.00) at the Billings, Montana Post Office, to a PS-3 Custodian ($35,344.00) at the same location, based on a charge that he was unable to attend required training at the Norman, Oklahoma Training Center (TTC) due to his medical condition (hypertension), which prevented him from sitting for prolonged periods of time in a car, plane or classroom. Appeal File (AF), Tab 8, Subtabs 4P, 4U. The duties and responsibilities of a PS-9 ET include participating in classroom, on-the-job, and correspondence training programs, and attending courses at postal facilities, trade schools, and manufacturers' sites. AF, Tab 9, Subtab 4PPP.

On appeal, the appellant alleged that the agency discriminated against him based on a disability, and that the penalty was not reasonable. AF, Tab 23. After a hearing, the administrative judge found that the charge was sustained, the appellant did not prove discrimination and that the penalty was reasonable.

ANALYSIS

New Evidence

The appellant submits for the first time with his petition for review a copy of a September 1, 1987 Memorandum of Understanding between the American Postal Workers Union, AFL-CIO, and the U.S. Postal Service that sets for the procedures to be used when an employee is temporarily unable to work all of the duties of his normal assignment. The appellant claims that he did not submit this document below because his attorney believed that "the point had been well made through

other evidence and testimony." Petition for Review (PFR) at 8.

The Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 MS.SP.R. 211, 214 (1980). Here, the appellant has made no such showing. Moreover, the appellant is responsible for the errors of his chosen representative. *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). Thus, we have not considered this evidence on review.

The Charge

The appellant does not contest on review the administrative judge's finding that the agency proved its charge, and we discern no error in that finding. The agency's charge, therefore, is sustained.

Disability Discrimination

An appellant who raises a claim of disability discrimination may establish that he is disabled by showing that he has a physical or mental impairment that substantially limits a major life activity, that he has a record of such an impairment, or that he is regarded as having such impairment. *See* 29 C.F.R. §1614.203(a)(1). The term "major life activity" means "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1614.203(a)(3).[5] The term

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[5]This list in not exhaustive. For example, other major life activities include, but are not limited to sitting, standing, lifting and reaching. Appendix to 29 C.F.R. §1630.2(i).

"substantially limits" describes a average person in the general population can perform, or is person who is unable to perform a major life activity that the average person in the general population can perform, or is significantly restricted as to the condition, manner, or duration under which he can perform a particular major life activity as compared with the condition, manner, or duration under which the average person in the general population can perform the same major life activity. 29 C.F.R. §1630.2(j)(1); *see Medina v. Reno*, EEOC No. 01954883 (Dec. 5, 1997); *Walsh v. U.S. Postal Service*, 74 M.S.P.R. 627, 633 (1997) (the Rehabilitation Act was amended to incorporate the standards applied under Title I of the Americans with Disabilities Act).

To meet his burden of proof with respect to establishing a prima facie case of disability discrimination where the appellant cannot perform his job without some form of reasonable accommodation, the appellant must show that he is a disabled person, that the action appealed was based on his disability, and, to the extent possible, he must articulate a reasonable accommodation under which he believes he could perform the essential functions of his position or of a vacant position to which he could be reassigned. *Clark v. U.S. Postal Service*, 74 M.S.P.R. 552, 560 (1997). Where the agency explicitly bases its action on an appellant's disability, the issue becomes whether the appellant is a qualified disabled person against whom the agency may not discriminate, and whether the agency shows that the reasonable accommodation at issue would create an undue hardship. *Brocks v. U.S. Postal Service*, 78 M.S.P.R. 101, 106 (1997). Ultimately, the appellant must prove that he is a "qualified" disabled person, e.g., a disabled individual who

can perform the essential functions[2] of his position, with or without reasonable accommodation, without reasonable accommodation, without endangering the health and safety of himself or others. *Id.*

If the appellant establishes a prima facie case, the agency must produce evidence to rebut the appellant's claim. If the employer claims that the disabled individual is unqualified to perform the job, even with the proposed accommodation, the disabled individual must prove that he would, in fact, be qualified to perform the essential functions of the job if the employer were to adopt the proposed accommodation, and that the proposed accommodation is objectively reasonable. *Id.* at 107. The burden of proof remains with the appellant in such a case. *Id.* If the appellant does prove that he can perform his job, or a position to which he can be reassigned, with reasonable accommodation, and/or the agency concedes this point, the burden of production shifts to the agency to show that the reasonable accommodation at issue would create an undue hardship. Id. In determining whether a proposed accommodation would create an undue hardship for the agency, the Board will consider: (1) the overall size of the agency's program with respect to the number of employees, number and type of facilities, and size of budget; (2) the type of the agency's operation, including

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[2] The term "essential functions" generally means the fundamental job duties of the employment position the individual with a disability holds or desires. 29 C.F.R. §1630.2(n)(1). The regulations set forth reasons why a job function may be considered essential, as well as evidence of whether a particular function is essential. 29 C.F.R. §1630.2(n)(2)-(3).

the nature and composition of the agency's work force; and (3) the nature and cost of the accommodation. Id.

Here the administrative judge found that the appellant asserted that the agency should not have required him to attend training in Norman, Oklahoma, but instead should have accommodated him by permitting him to receive training in Billings, Montana. She found that the Norman, Oklahoma facility is a major training facility, processing 49,000 agency students each year. The administrative judge further found that it was a hands-on education facility for the agency's automated equipment, and that it would be prohibitively costly to shut down the extremely complex, on-site machinery in Billings, Montana in order to train one employee who could not travel to Norman, Oklahoma. The administrative judge thus found that "the appellant's inability to travel to requisite training, which is a major part of his job, disqualifies him from retaining that position, and leads to the conclusion that he is not a qualified individual entitled to accommodation." She also found that "the agency did accommodate the appellant's medical condition by assigning him to a position within his qualifications that does not require him to travel."

On review, the appellant claims that the administrative judge did not address his claims that the agency could have accommodated him by affording him a deferral of the required training while his medical condition stabilized, as it did for another employee, or by assigning him to a position at a grade between PS-9 and PS-3, for which the testimony indicated he is qualified. PFR at 9-11. The agency, in response, asserts that the appellant is not qualified for any position above the PS-3 level because those positions "require some degree of

specified technical training, which the appellant cannot attend." PFR File, Tab 3 at 2.

While it is clear that the agency's action was based on the appellant's alleged disability, the administrative judge made no findings with respect to whether the appellant was in fact disabled, including whether his physical impairment "substantially limited" a major life activity. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include and administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests). In addition, the administrative judge erroneously did not address the appellant's argument that the agency should have reasonably accommodated him by deferring his training requirement and/or offering him a position at a higher grade level than PS-3. *See* Hearing Tape 6, Side A (appellant's closing argument); *Clifford v. Department of Agriculture*, 50 M.S.P.R. 232, 236 (1991) (remanding the appeal where the initial decision did not include findings and conclusions with respect to all of the appellant's proposed accommodations for his disabling condition.) When a nonprobationary employee becomes unable to perform the essential functions of his position even with reasonable accommodation due to a disability, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary, unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. 29

C.F.R. § 1614.203(g). In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required. Id.

Although the administrative judge found that training was a "major part" of the appellant's duties, she made no finding regarding whether it was an "essential function" of his position, nor did she summarize the evidence and legal reasoning in support of such a finding. *Spithaler*, 1 M.S.P.R. at 589. Further, the administrative judge erroneously found that the appellant's involuntary, disciplinary demotion constituted a reasonable accommodation. *See Edinboro v. Department of Health & Human Services*, 33 M.S.P.R. 91, 93 (1987) (an involuntary demotion cannot constitute a reasonable accommodation). Such an involuntary demotion is to be contrasted with an offer (and voluntary acceptance) of a reassignment to a vacant position at the highest available grade or level below the employee's current grade or level. See 29 C.F.R. § 1614.203(g).

Finally, the basis for the administrative judge's determination that the appellant is not a qualified disabled person is unclear. It is not clear, for example, whether she found that the appellant did not meet his burden of proving that his requested accommodation of training in Billings, Montana was objectively reasonable, or whether she found that the appellant was a qualified disabled person, but the agency met its burden of proving that the reasonable accommodation at issue would create an undue hardship.

Accordingly, the above issues shall be addressed on remand.

Nexus

The appellant asserts on review that he cannot be reduced in grade except upon a showing that the reduction is for such cause as will promote the efficiency of the service, and that such a showing was not made in this case. PFR at 11. Specifically, he alleges that testimony was presented that "training is staggered [among all the ETs] so that, at any given point in time, there are Ets qualified in each of the various areas of expertise necessary for an efficient operation of the department." PFR at 10. The appellant asserts that "[n]othing was offered which shows that a deferral of Mr. Fox's training would in ay way affect the efficiency of the service. Rather, it is clear that enough of the ET's had received training so as to enable a 'qualified' individual to be on premises at all times." Id.

The initial decision does not address the issue of nexus. Thus, the administrative judge shall address this issue on remand, including the arguments made by the appellant on this issue below and on review. *See Goldstein v. Department of the Treasury*, 62 M.S.P.R. 622, 628 (1994), *vacated and remanded on other grounds*, 62 F.3d 1430 (Fed. Cir. 1995) (Table).

The Penalty

The appellant asserts that, while the initial decision addresses the issue of the harshness of the penalty in s disparate treatment context, it does not address the issue of whether the nature of extent of the demotion was appropriate. For example, the appellant asserts that testimony was offered at the hearing that there are positions between the PS-9 ET position and the PS-3 Custodian position, and that the appellant was qualified for those positions.

As set forth above, an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler*, 1 M.S.P.R. at 589; see 5 C.F.R. § 1201.111(b)(1) (each initial decision shall contain "[f]indings of fact and conclusions of law upon all the material issues of fact and law presented on the record," as well as "[t]he reasons or bases for those findings and conclusions."). Here, after addressing the appellant's disparate penalty claim, the initial decision merely finds that "the agency considered the relevant factors and imposed a penalty that is within the realm of reasonableness. See testimonies of Bob Klein, and John Wathen; *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981)." There is no summary of the evidence relating to the reasonableness of the penalty, nor any discussion of the relevant *Douglas* factors and why the agency should be deemed to have exercised its discretion within the tolerable limits of reasonableness by demoting the appellant to a PS-3 position.

An initial decision becomes in many cases the final decision of the Board. Consequently, such a decision is required to constitute an "adjudication," 5 U.S.C. § 1204(a)(1), which must be articulated in a reasoned opinion providing an adequate basis for review by a Court of Appeals. This is essential to enable the parties and any reviewing court to determine the factual basis for the Board's decision and to ascertain whether the Board considered all relevant factors or made an error of judgment, *Spithaler*, 1 M.S.P.R. at 588.

Here, we cannot determine from the initial decision whether the administrative judge considered all relevant

factors or made an error of judgment with regard to the agency's choice of penalty. The initial decision, therefore, does not meet the *Spithaler* standard, and must be remanded. See *Lassiter v. Department of Justice*, 60 M.S.P.R. 138, 148 (1993) (where the appellant argued that the agency should have mitigated its penalty by reassigning him to an administrative position, and the administrative judge did not address this contention, the Board found error under *Spithaler); Wellman v. Department of the Navy*, 49 M.S.P.R. 149, 152-53 (1991) (the administrative judge's failure to consider the appellant's medical condition in determining the appropriateness of the penalty was error under *Spithaler); Angelo v. U.S. Postal Service*, 52 M.S.P.R. 664,668 (1992) (remanding the appeal where the administrative judge failed to address all relevant mitigating factors).

The appellant also claims that the administrative judge erred in finding no disparate treatment. The administrative judge found that "[t]he appellant also asserts that the penalty is too harsh, citing the example of another ET employee, Al Doney, who was granted a temporary dispensation from travel to training due to a medical condition. In the case of Mr. Downey [sic], the disability was temporary, whereas with the appellant, who still does not even report to work at all, there is no end in sight to his inability to travel. Thus, I find no disparity in the two situations."

As the appellant asserts on review, See PFR at 9, there is some evidence in the record suggesting that he has not been able to return to work due to conditions (situational adjustment disorder, significant anxiety disorder, and depression) that arose from his demotion, not from his initial hypertension. See e.g., AF, Tab 22,

Exs. B and C; AF, Tab 16, Subtab 4. There is some record evidence also suggesting that the appellant's hypertension was temporary, like the medical problems of Doney. See AF, Tab 9, Subtab 4EE (October 8, 1997 letter from Dr. Carr indicating that he had advised the appellant to "decline this training session at this time," and that he would continue to follow the appellant on at least a quarterly basis "to re-evaluate in the future.").

Thus the administrative judge's basis for finding the situations of Doney and the appellant dissimilar appears to be unsupported. The claim of disparate penalty shall be reexamined on remand.

ORDER

We REMAND this appeal for further adjudication and the issuance of a new initial decision consistent with this Opinion and Order.

FOR THE BOARD: S/

Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX H

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

RICHARD J. FOX, Appellant,	)	DOCKET NUMBER DE-0752-98-0211-I-1
v.	)	
UNITED STATES POSTAL SERVICE, Agency.	)	DATE: April 24, 1998

Rosemary Boschert, Esquire, and Toby Alback, Boschert Law Firm, Billings, Montana, for the appellant.

Pat Simmons, Billings, Montana, for the agency.

BEFORE

Peggy J. Seaman

Administrative Judge

INITIAL DECISION

On February 20, 1998, this office received the appellant's petition for appeal of the agency's action in demoting him from the Level 9 position of Electronics Technician (ET) to the Level 3 position of Custodian. The Board has jurisdiction over this appeal. 5 U.S.C. §§ 7511-13: 7701-02. For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS

The agency based its action upon the charge that the appellant was "unable to attend required training at the Norman, Oklahoma Technical Training Center, due to [his] medical condition." Appeal File, Tab 8, Subtab 4U. Although the proposed notice did not specify the allegedly disqualifying medical condition at issue, it is undisputed that the appellant suffers from high blood pressure, and that both his own doctor, and the agency's, have stated that he is unable to travel to the training site as a result of that condition. Appeal File, Tab 9, Subtabs 4BB, and 4EE. Indeed, it is undisputed that, since the time of the demotion action, the appellant has remained medically unable to even port for work at all. Accordingly, I SUSTAIN the agency's charge.

The appellant maintains that the agency discriminated against him on the basis of his medical disability. Although the necessary elements of a prima facie case of disability discrimination will vary according to the particular facts and circumstances at issue, they generally include: a showing that the person is a disabled person and the action appealed was based on his disability; and, to the extent possible, an articulation of a reasonable accommodation under which the appellant believes he could perform the essential duties of his position or of a vacant position to which he could be reassigned. *Savage v. Department of the Navy*, 36 M.S.P.R. 148, 151-52 (1988).

Here, the appellant maintains that the agency should not have required him to go for training in Norman, Oklahoma, but should have accommodated him by permitting him to receive training, in some fashion, in Billings, Montana. The Norman, Oklahoma facility is a major facility for the agency, processing some 49,000 agency students a year. Testimony of Howard Wright. It

is a hand-on-educational facility for the agency's automated equipment, and it would be prohibitively costly to shut down, extremely complex, on-site machinery in Billings, Montana, in order to train one employee who cannot travel to Norman, Oklahoma. Id. Each ET requires about 20-25 weeks of annual training in Norman, Oklahoma. Id Thus, I find that the appellant's inability to travel to requisite training, which is a major part of his job, disqualifies him from retaining that position, and leads to the conclusion that he is not a qualified individual entitled to accommodation. Nevertheless, I find that the agency did accommodate the appellant's medical condition by assigning him to a position within his qualifications that does not require him to travel. This affirmative defense is NOT SUSTAINED.

The appellant also asserts that the penalty is too harsh, citing the example of another ET employee, Al Doney, who was granted a temporary dispensation from travel to training due to a medical condition. In the case of Mr. Downey, the disability was temporary, whereas with the appellant, who still does not even report to work at all, there is no end in sight to his inability to travel. Thus, I find no disparity in the two situations. Rather, I find that the agency considered the relevant factors and imposed a penalty that is within the realm of reasonableness. See testimonies of Bob Klein, and John Wathen; *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 306 (1981).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: S/

Peggy J. Seaman

Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on September 28, 1998, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by reference to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board

Merit Systems Protection Board

1120 Vermont Avenue, NW., Room 806

Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations

Equal Employment Opportunity Commission

P. O. Box 19848

Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court,

you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. §2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment At, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. See 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX I

This Appendix provides a verbatim listing of the pertinent parts of the statutes, regulations and rules cited in this Petition.

1. Section 2302 of Title 5 of the United States Code states as follows (Release Date 2005-05-26):

(a)

(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination; and

(xi) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration; and

(C) "agency" means an Executive agency and the Government Printing Office, but does not include—

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8);

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 (d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

.....

2. Section 7513 of Title 5 of the United States Code states as follows (Release Date 2005-05-18):

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

3. Section 7703 of Title 5 of the United States Code states as follows (Release Date 2005-05-18):

(a)

(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying

personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)

(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16 (c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a (c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216 (b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section,

the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

4. Section 1254 of Title 28 of the United States Code states as follows (Release Date 2004-10-27):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding

instructions or require the entire record to be sent up for decision of the entire matter in controversy.

5. Section 791 of Title 29 of the United States Code states as follows (Release Date 2004-10-27):

(a) Interagency Committee on Employees who are Individuals with Disabilities; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions

There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs, the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. Either the Director of the Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President's Committees on Employment of People With Disabilities and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee

(1) to provide a focus for Federal and other employment of individuals with disabilities, and t[illegible]eview, on a periodic basis, in cooperation with the Commission, the adequacy

of hiring, placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government and the Smithsonian Institution, and to insure that the special needs of such individuals are being met; and

(2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring,

placement, and advancement opportunities for individuals with disabilities.

(c) State agencies; rehabilitated individuals, employment

The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) Report to Congressional committees

The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with disabilities by each department, agency, and instrumentality and the Smithsonian Institution and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) Federal work experience without pay; non-Federal status

An individual who, as a part of an individualized plan for employment under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of People With Disabilities

(1) The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with the President's Committee on Employment of People With Disabilities in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of People With Disabilities, special consideration shall be given to qualified individuals with disabilities.

(g) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

6. Section 12102 of Title 42 of the United States Code states as follows (Release Date 2005-02-25):

As used in this Act:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

7. Section 752.403 of Title 5 of the Code of Federal Regulations states as follows (Release Date 2005-01-01):

(a) An agency may take an adverse action, including a performance-based adverse action, under this subpart only such cause as will promote the efficiency of the service.

(b) An agency may not take an adverse action against an employee on the basis of any reason prohibited by 5 U.S.C. 2302.

[45 FR 46778, July 11, 1980, as amended at 53 FR 21623, June 9, 1988]

8. Subsection 1630.2(i) of the Appendix to Title 29 Part 1630 of the Code of Federal Regulations states as follows (Release Date 2003-07-01):

This term adopts the definition of the term "major life activities" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. See Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

9. Rule 56 of the Federal Rules of Civil Procedure states as follows (Release Date 2004-12-01):

Rule 56. Summary Judgment

(a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with

or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such

further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX J

USPS Rule 711.412 of Employee and Labor Manual ("ELM") states as follows:

711.412 Conditions

To be categorized as Job Training, all of the following conditions apply:

a. Management requires attendance at the training.

b. The training is directly related to the performance of the employee's current job or specific future assignment subject to satisfactory completion of the training and/or a job examination.

c. Refusal to attend the training, or less than satisfactory performance in the training, may jeopardize the employee's present position or make the employee ineligible for qualification or promotion to a specific position or duty.

APPENDIX K

BILLINGS WEST INTERNAL MEDICINE

October 17, 1997

Richard Fox: Fitness for Duty. Post Office.

Mr. Fox was seen and examined by me on October 17, 1997. Mr. Fox has started on a fair amount of blood pressure medications since I last saw him. He has somewhat of a difficult time explaining exactly what sort of symptoms he has related to his BP but he does state that if he sits for a long period of time, he develops soreness in his neck, some pressure in his head and some numbness and tingling of both his feet and hands. Because of this, he is unable to drive or sit in an airplane or bus or vehicle for any length of time. As long as he is moving, he seems to get along okay.

Medications: Lopressor 50 mgs twice daily. Dyazide one daily. Norvasc 5 mgs daily. One other medication which he cannot remember.

He has had BP elevation on and off since the 1970s, he states. He is able to walk without any trouble but sitting does cause this pressure sensation to build up. If he attends meetings, prolonged sitting aggravates him. His blood pressure builds up. He can feel the pressure in his head and he becomes extremely uncomfortable and then will develop some numbness and tingling in his hands. He sees Dr. Carr on a monthly basis who takes care of his medical problems. He has never had a stress test and I have suggested that perhaps this would be a reasonable thing to do with the pressure in his chest, neck, and head.

Physical Examination:

The patient is obese. BP is 150/90.

Heent: Normal.

Neck: Carotids are equal bilaterally.

Chest: Clear.

Heart: Regular.

Remainder of the examination is normal.

Impression:

1. Hypertension, under treatment.

At the present time I don't think his blood pressure or medication

Richard Fox.

10/17/97 cont.

effects his ability to perform the "essential" functions of his position but it probably does effect his ability to travel to Oklahoma and attend required training sessions. Mr. Fox does not have a diagnosis of peripheral neuropathy. This is a misnomer of what his symptomology is. Why Mr. Fox refuses to attend training in Oklahoma is a question that his supervisors will have to answer. I think that Mr. Fox can currently work in the position that he is in without adversely effecting himself or his condition of hypertension. However, I would suggest that any training that needs to be done with Mr. Fox could certainly be done in a different manner with video or written instructions.

S/

David K. Drill, M.D./jrs

(2)

No. 05-540

IN THE

Supreme Court of the United States

Richard J. Fox,

Petitioner,

v.

U.S. POSTAL SERVICE,
John E. Potter,
Postmaster General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

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PETITION FOR REHEARING

Richard J. Fox
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Billings, MT 59102-6776
(406) 656-3551
Acting Pro Se

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PETITION FOR REHEARING

Petitioner herein submits a Petition for Rehearing under authority afforded by Supreme Court Rule 44.2

INTRODUCTION

Petitioner has recently been reading a book on "quantum reality". In it the author attempts to present in a non-technical manner the various views on what is reality for "quantum stuff". One of the viewpoints is the "quantum logic" approach to quantum theory. In this

approach, the world does not obey ordinary classical rules of logic but rather follows a non-human "quantum logic" type of reasoning. Petitioner has come to a similar belief about the legal system. It must follow its own extraordinary rules of reasoning which one might call "judicial logic". Petitioner has failed time and again in his attempts to present facts and argument that Fox logically assumed should have given reason for the Court(s) to reverse a summary judgment that self-evidentially should not have been granted. Hopefully, the perspective gained about the possibility of alternate reasoning systems will enable Petitioner to fashion the argument to follow that will be in line with judicial logical reasoning and, that, along with the new grounds argued, will persuade the Court to grant Petitioner a favorable ruling.

ARGUMENT

I. THE UNDERLYING BASIS FOR PETITIONER'S ACTION IS THE PROTECTION AFFORDED BY THE AMERICANS WITH DISABILITIES ACT ("ADA"). THE ADA IS A LAW THAT TOUCHES THE LIVES OF THOUSANDS OF CITIZENS AND THUS ANY VIOLATION OF ITS PROTECTIONS NOT PROPERLY ADJUDICATED IS A CIRCUMSTANCE OF GREAT WEIGHT THAT EASILY MEETS THE SUPREME COURT'S "STANDARDS" OF REVIEW.

The ADA is an important law in which Congress has attempted to provide protection for America's handicapped. Specifically, in the Petition for Certiorari

and elsewhere it has been argued that Petitioner was clearly disabled as defined in 42 USC § 12102(2)(C)[1] and thus the employer should have provided Petitioner the accommodation required for a disabled person under the ADA. Petitioner's grounds for asserting that this violation rises to a level of importance that should be addressed by the Court are: (1) there are numerous people that are or will be affected by subpart (C) rulings of disability; and (2) the Court has addressed subpart (A) criteria but has not considered subpart (C) standards. In the Court's recent rulings it has seen fit to review cases concerning people being *offended* by viewing Nativity scenes on public property. Petitioner realizes there are three-degrees-of-freedom-from-Kevin Bacon type of arguments that try to make the connection between these offenses and the Establishment Clause of the First Amendment, but these are still just sensibility "offenses". Employer violations of the ADA actually harm people financially and, in some cases, physically also. It would seem to Petitioner that providing clear interpretation guidelines of this part of the ADA that would judicially strengthen the protection intended by Congress would be at least as important as cases involving "offended" people.

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[1] 42 USC § 12102(2) states:

Disability – the term "disability" means with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

II. THE VARIOUS APPELLATE COURTS' RULINGS ON THE ADA ARE SPLIT AND THUS THE SUPREME COURT SHOULD PROVIDE FURTHER JUDICIAL GUIDELINES.

Additional proof not previously presented that supports this petition is the fact that the Ninth Circuit's ruling in this case is not logically in accord with other Courts' opinions. As Petitioner pointed out in his Petition for a Writ of Certiorari, various courts' opinions on whether or not a person is disabled as defined by subpart (C) of 42 USC § 12102(2) specified the conditions that are to be met for a positive determination of disability—such as, knowledge of employee's condition by employer. As Petitioner demonstrated in his Petition for Writ of Certiorari, the facts of this case clearly exhibit that Petitioner has met the "conditions" required by these various opinions to make a determination that Petitioner is disabled according to 42 USC § 12102(2)(C). Regardless, the Ninth Circuit ruled that Petitioner was not disabled even though he met the conditions specified by other courts that would allow him to be considered disabled by these courts. Thus, we clearly have colliding court opinions of who is to be ruled as a disabled person under the ADA.

This split in Appellate Court rulings is clearly shown in the Seventh Circuit Court's opinion in the *Nese* case, a subpart (C) case. *Nese v. Julian Nordic Construction Co.*, 405 F.3d 683 (7th Cir. 2005). In its ruling the Seventh Circuit discussed a case decided by the Sixth Circuit, *Ross v. Campbell Soup Co.* The Seventh Circuit declared that

"we decline to follow Ross". In other words, the ruling logic used by these two courts was not the same.

III. THE LOWER COURTS' RULINGS ARE A MISREADING OF SUPREME COURT RULINGS ON THE ADA AND THUS THIS ALSO ARGUES FOR ADDITIONAL GUIDELINES FROM THE SUPREME COURT.

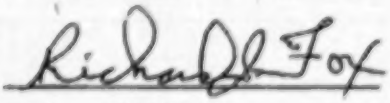
A further reason not previously presented that buttresses Petitioner's Petition for Rehearing is the fact that the lower courts in this case have misread the precedent set down in previous Supreme Court cases for determining whether a person is disabled as these precedents apply to Petitioner. The lower courts are now relying mainly on their reading of the *Toyota* case and how its guidelines apply to the other subparts of 42 USC § 12102(2). *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 193 (2002). It is obvious from the opinions issued since the ruling on this case that the Supreme Court's criticism of the Sixth Circuit in that case has produced the effect of having the courts in the main denying all subpart (A) disability cases not "bullet proof" and applying unachievable standards to subpart (B) and subpart (C). (Fox is personally aware of two such cases in just the one District Court of record in Petitioner's case.) Thus, instead of viewing each matter on a case by case basis as directed by the Supreme Court, the lower courts that Petitioner has had to deal with are lumping them all together under one broad standard and only granting a ruling of disability in cases where they cannot possibly be overruled. (In Petitioner's case, Fox has been lumped

with persons with hypertension rather than considering the *effects* of Petitioner's impairment as directed by the Supreme Court. See Appendix B of Petitioner's Petition for Writ of Certiorari.) The result has been the effective gutting of subparts (B) and (C) of 42 USC § 12102(2) and a loss of the protection to the handicapped that Congress wanted to provide. This denial of ADA rights has been in great part responsible for the denial of an opportunity to be heard at a trial which is a further loss of Petitioner's due process rights guaranteed by the Fifth Amendment.

CONCLUSION

For all the foregoing reasons, Petitioner requests that his Petition for Rehearing be granted.

Respectfully submitted,



Richard J. Fox
Acting Pro Se

December 30, 2005.

CERTIFICATE OF *PRO SE* PETITIONER

I certify that the Petition for Rehearing is filed in conformity with Supreme Court Rule 44.2 and is presented in good faith and not for delay.

Dated: December 30, 2005

/S/ _____

Richard J. Fox

Acting *Pro Se*